I

113TH CONGRESS
1ST SESSION

# H. R. 1982

To amend section 1862 of the Social Security Act with respect to the application of Medicare secondary payer rules to workers' compensation settlement agreements and Medicare set-asides under such agreements.

---

IN THE HOUSE OF REPRESENTATIVES

MAY 15, 2013

Mr. REICHERT (for himself and Mr. THOMPSON of California) introduced the following bill; which was referred to the Committee on Ways and Means, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

# A BILL

To amend section 1862 of the Social Security Act with respect to the application of Medicare secondary payer rules to workers' compensation settlement agreements and Medicare set-asides under such agreements.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ''Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2013''.

**SEC. 2. APPLICATION OF MEDICARE SECONDARY PAYER RULES TO CERTAIN WORKERS' COMPENSATION SETTLEMENT AGREEMENTS AND QUALIFIED MEDICARE SET-ASIDE PROVISIONS.**

(a) THRESHOLD FOR SECONDARY PAYER PROVISIONS FOR CERTAIN WORKERS' COMPENSATION SETTLEMENT AGREEMENTS.—Section 1862 of the Social Security Act (42 U.S.C. 1395y) is amended—

(1) in subsection (b)(2)(A)(ii), by inserting ''subject to subsection (p),'' after ''(ii)''; and

(2) by adding at the end the following new subsection:

''(p) THRESHOLD FOR SECONDARY PAYER PROVISIONS FOR CERTAIN WORKERS' COMPENSATION SETTLEMENT AGREEMENTS.—

''(1) IN GENERAL.—A workers' compensation law or plan shall not be treated as a primary plan for purposes of subsection (b) with respect to a workers' compensation settlement agreement if the agreement (or claimant under the agreement) meets any of the following requirements:

''(A) TOTAL SETTLEMENT AMOUNT NOT EXCEEDING $25,000.—Such agreement has a total settlement amount (as determined under paragraph (2)) that does not exceed $25,000 or

such greater amount as the Secretary may specify in regulations.

''(B) LIKELY INELIGIBILITY OF WORKERS' COMPENSATION CLAIMANT FOR MEDICARE BENEFITS.—The claimant subject to such agreement—

''(i) is not eligible for benefits under this title as of the effective date of the agreement; and

''(ii) is unlikely to become so eligible, as determined under paragraph (3), within 30 months after such effective date.

''(C) NO FUTURE WORKERS' COMPENSATION MEDICAL EXPENSES.—The claimant subject to such agreement is not eligible for payment of medical expenses incurred after the effective date of the agreement from the workers' compensation law or plan of the jurisdiction in which such agreement will be effective.

''(D) NO LIMITATION ON FUTURE WORKERS' COMPENSATION MEDICAL EXPENSES.—Such agreement does not limit or extinguish the right of the claimant to payment of medical expenses incurred after the effective date of such agreement by the workers' compensation law or

plan of the jurisdiction in which the agreement will be effective.

''(2) DETERMINATION OF TOTAL SETTLEMENT AMOUNT OF WORKERS' COMPENSATION SETTLEMENT AGREEMENT.—For purposes of paragraph (1)(A) and subsection (q) and with respect to a work-related injury or illness that is the subject of a workers' compensation settlement agreement, the total settlement amount of the agreement is the sum of monetary wage replacement benefits, attorney fees, all future medical expenses, repayment of Medicare conditional payments, payout totals for annuities to fund the expenses listed above, and any previously settled portion of the workers' compensation claim.

''(3) DETERMINATION OF LIKELY INELIGIBILITY OF CLAIMANT FOR MEDICARE BENEFITS.—For purposes of paragraph (1)(B)(ii), a workers' compensation claimant shall be deemed unlikely to become eligible for benefits under this title within 30 months after the effective date of the agreement unless, as of the effective date of the agreement, such claimant is insured for disability insurance benefits under section 223(c)(1) and is described in any of the following subparagraphs:

''(A) AWARDED DISABILITY BENEFITS.—The individual has been awarded such disability insurance benefits.

''(B) APPLIED FOR DISABILITY.—The individual has applied for such disability insurance benefits.

''(C) ANTICIPATES APPEAL.—The individual has been denied such disability insurance benefits but anticipates appealing that decision.

''(D) APPEALING OR REFILING.—The individual is in the process of appealing or refiling for such disability insurance benefits.

''(E) MINIMUM AGE.—The individual is at least 62 years and 6 months of age.

''(F) END-STAGE RENAL DISEASE.—The individual is medically determined to have end-stage renal disease but does not yet qualify for health benefits under section 226A based on such disease.

''(4) DEFINITIONS.—For purposes of this subsection and subsection (q):

''(A) COMPROMISE AGREEMENT.—The term 'compromise agreement' means a workers' compensation settlement agreement that—

"(i) applies to a workers' compensation claim that is denied or contested, in whole or in part, by a workers' compensation payer involved under the workers' compensation law or plan applicable to the jurisdiction in which the agreement has been settled; and

"(ii) does not provide for a payment of the full amount of benefits sought or that may be payable under the workers' compensation claim.

"(B) COMMUTATION AGREEMENT.—The term 'commutation agreement' means a workers' compensation settlement agreement to settle all or a portion of a workers' compensation claim, in which—

"(i) liability for past and future benefits is not disputed; and

"(ii) the parties to the agreement agree to include payment for future workers' compensation benefits payable after the date on which the agreement becomes effective.

"(C) WORKERS' COMPENSATION CLAIMANT.—The term 'workers' compensation claimant' means a worker who—

"(i) is or may be covered under a workers' compensation law or plan; and

"(ii) submits a claim or accepts benefits under such law or plan for a work-related injury or illness.

"(D) WORKERS' COMPENSATION LAW OR PLAN.—

"(i) IN GENERAL.—The term 'workers' compensation law or plan' means a law or program administered by a State or the United States to provide compensation to workers for a work-related injury or illness (or for disability or death caused by such an injury or illness), including the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901–944, 948–950), chapter 81 of title 5, United States Code (known as the Federal Employees Compensation Act), the Black Lung Benefits Act (30 U.S.C. 931 et seq.), and part C of title 4 of the Federal Coal Mine and Safety Act (30 U.S.C. 901 et seq.), but not

including the Act of April 22, 1908 (45 U.S.C. 51 et seq.) (popularly referred to as the Federal Employer's Liability Act).

"(ii) INCLUSION OF SIMILAR COMPENSATION PLAN.—Such term includes a similar compensation plan established by an employer that is funded by such employer or the insurance carrier of such employer to provide compensation to a worker of such employer for a work-related injury or illness.

"(E) WORKERS' COMPENSATION PAYER.—The term 'workers' compensation payer' means, with respect to a workers' compensation law or plan, a workers' compensation insurer, self-insurer, employer, individual, or any other entity that is or may be liable for the payment of benefits to a workers' compensation claimant pursuant to the workers' compensation law or plan.

"(F) WORKERS' COMPENSATION SETTLEMENT AGREEMENT.—The term 'workers' compensation settlement agreement' means an agreement, which includes a commutation agreement or compromise agreement, or any combination of both, between a claimant and

one or more workers' compensation payers which—

"(i) forecloses the possibility of future payment of some or all workers' compensation benefits involved; and

"(ii)(I) compensates the claimant for a work-related injury or illness as provided for by a workers' compensation law or plan; or

"(II) eliminates cause for litigation involving issues in dispute between the claimant and payer.".

(b) SATISFACTION OF SECONDARY PAYER REQUIREMENTS THROUGH USE OF QUALIFIED MEDICARE SET-ASIDES UNDER WORKERS' COMPENSATION SETTLEMENT AGREEMENTS.—Section 1862 of the Social Security Act (42 U.S.C. 1395y), as amended by subsection (a), is further amended by adding at the end the following new subsection:

"(q) TREATMENT OF QUALIFIED MEDICARE SET-ASIDES UNDER WORKERS' COMPENSATION SETTLEMENT AGREEMENTS.—

"(1) SATISFACTION OF SECONDARY PAYER REQUIREMENTS THROUGH USE OF QUALIFIED MEDICARE SET-ASIDES.—

"(A) FULL SATISFACTION OF CLAIM OBLIGATIONS.—

"(i) IN GENERAL.—If a workers' compensation settlement agreement, related to a claim of a workers' compensation claimant, includes a qualified Medicare set-aside (as defined in paragraph (2)), such set-aside shall satisfy any obligation with respect to the present or future payment reimbursement under subsection (b)(2) with respect to such claim. The Secretary shall have no further recourse, directly or indirectly, under this title with respect to such agreement.

"(ii) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as requiring the submission of a Medicare set-aside to the Secretary.

"(B) MEDICARE SET-ASIDE AND MEDICARE SET-ASIDE AMOUNT DEFINED.—For purposes of this subsection:

"(i) MEDICARE SET-ASIDE.—The term 'Medicare set-aside' means, with respect to a workers' compensation settlement agreement, a provision in the agree-

ment that provides for a payment of a lump sum, annuity, a combination of a lump sum and an annuity, or other amount that is in full satisfaction of the obligation described in subparagraph (A) for items and services that the workers' compensation claimant under the agreement received or is likely to receive under the applicable workers' compensation law and for which payment would be made under this title, but for subsection (b)(2)(A).

''(ii) MEDICARE SET-ASIDE AMOUNT.—The term 'Medicare set-aside amount' means, with respect to a Medicare set-aside, the actual dollar amount provided for in clause (i).

''(2) QUALIFIED MEDICARE SET-ASIDE.—

''(A) REQUIREMENTS OF QUALIFIED MEDICARE SET-ASIDE.—For purposes of this subsection, the term 'qualified Medicare set-aside' is a Medicare set-aside in which the Medicare set-aside amount reasonably takes into account the full payment obligation described in paragraph (1)(A), while meeting the requirements of

subparagraphs (B) and (C) and giving due consideration to the following:

"(i) The illness or injury giving rise to the workers' compensation claim involved.

"(ii) The age and life expectancy of the claimant involved.

"(iii) The reasonableness of and necessity for future medical expenses for treatment of the illness or injury involved.

"(iv) The duration of and limitation on benefits payable under the workers' compensation law or plan involved.

"(v) The regulations and case law relevant to the State workers' compensation law or plan involved.

"(B) ITEMS AND SERVICES INCLUDED.—A qualified Medicare set-aside—

"(i) shall include payment for items and services that are covered and otherwise payable under this title as of the effective date of the workers' compensation settlement agreement and that are covered by the workers' compensation law or plan; and

"(ii) is not required to provide for payment for items and services that are not described in clause (i).

"(C) PAYMENT REQUIREMENTS.—

"(i) REQUIRED USE OF WORKERS' COMPENSATION FEE SCHEDULE.—

"(I) IN GENERAL.—Except in the case of an optional direct payment of a Medicare set-aside made under paragraph (5)(A), the set-aside amount shall be based upon the payment amount for items and services under the workers' compensation fee schedule (effective as of the date of the agreement) applicable to the workers' compensation law or plan involved.

"(II) WORKERS' COMPENSATION FEE SCHEDULE DEFINED.—For purposes of this subsection, the term 'workers' compensation fee schedule' means, with respect to a workers' compensation law or plan of a State or a similar plan applicable in a State, the schedule of payment amounts the

State has established to pay providers for items and services furnished to workers who incur a work-related injury or illness as defined under such law or plan (or in the absence of such a schedule, the applicable medical reimbursement rate under such law or plan).

''(ii) OPTIONAL PROPORTIONAL ADJUSTMENT FOR COMPROMISE SETTLEMENT AGREEMENTS.—

''(I) IN GENERAL.—In the case of a compromise settlement agreement, a claimant or workers' compensation payer who is party to the agreement may elect to calculate the Medicare set-aside amount of the agreement by applying a percentage reduction to the Medicare set-aside amount for the total settlement amount that could have been payable under the applicable workers' compensation law or similar plan involved had the denied or contested portion of the claim not been subject to a com-

promise agreement. The percentage reduction shall be equal to the denied or contested percentage of such total settlement. Such election may be made by a party to the agreement only with the written consent of the other party to the agreement.

''(II) APPLICATION.—If the claimant or workers' compensation payer elects to calculate the Medicare set-aside amount under this clause, the Medicare set-aside shall be deemed a qualified Medicare set-aside.

''(D) CERTAIN MEDICARE SET-ASIDES WITH SAFE HARBOR AMOUNT DEEMED QUALIFIED MEDICARE SET-ASIDES.—

''(i) IN GENERAL.—For purposes of this section and subject to clause (iv), a Medicare set-aside of a workers' compensation settlement agreement shall be deemed a qualified Medicare set-aside if the Medicare set-aside amount involved is the safe harbor amount for the agreement and the agreement does not exceed $250,000.

"(ii) WRITTEN CONSENT.—A safe harbor amount, with respect to a workers' compensation agreement, shall be treated as the Medicare set-aside amount for such agreement for purposes of clause (i) only upon written consent of all parties to the agreement.

"(iii) SAFE HARBOR AMOUNT DEFINED.—For purposes of this subsection, the term 'safe harbor amount' means, with respect to a workers' compensation settlement agreement, 15 percent of the total settlement amount of the agreement (as determined under subsection (p)(2)), excluding repayment of conditional payments and previously settled portions of the claim involved. In applying the previous sentence for purposes of determining the safe harbor amount, with respect to a workers' compensation agreement, if the agreement includes an annuity, the cost (but not the payout of the annuity) shall be included in determining the total settlement amount of the agreement.

"(iv) MANDATORY DIRECT PAYMENT OF SAFE HARBOR AMOUNT.—A Medicare set-aside of a worker's compensation settlement agreement described in this paragraph may not be treated as a qualified set-aside under clause (i) unless an election is made under paragraph (5)(A) to transfer to the Secretary a direct payment of such set-aside.

"(E) SECRETARIAL AUTHORITY WITH RESPECT TO DEEMED QUALIFIED MEDICARE SET-ASIDES WITH SAFE HARBOR AMOUNT.—

"(i) DETERMINATION.—If the Secretary determines, based on the data described in clause (ii), that the provisions of subparagraph (D) have caused a significant negative financial impact (as specified by the Chief Actuary of the Centers for Medicare & Medicaid Services) on the Federal Hospital Insurance Trust Fund under section 1817 or the Federal Supplementary Medical Insurance Trust Fund under section 1841, then the Secretary shall adopt rules to reduce such impact by modifying

the amount of the percent described in subparagraph (D)(iii).

''(ii) REQUIRED DATA.—The determination under clause (i) shall be based on data on—

''(I) the projected effect of the provisions described in such paragraph on the Federal Hospital Insurance Trust Fund under section 1817 or the Federal Supplementary Medical Insurance Trust Fund under section 1841 during the three-year period beginning on the date of the enactment of this subsection; as compared to

''(II) data on the effect on such trust funds of the provisions of subsection (b), as in effect during the three-year period prior to such date of enactment.

''(3) PROCESS FOR APPROVAL OF QUALIFIED MEDICARE SET-ASIDES.—

''(A) OPTIONAL PRIOR APPROVAL BY SECRETARY.—A party to a workers' compensation settlement agreement that includes a Medicare set-aside may submit to the Secretary the Medi-

care set-aside amount for approval of the set-aside as a qualified Medicare set-aside. The set-aside shall be submitted in accordance with a procedure specified by the Secretary.

''(B) NOTICE OF DETERMINATION OF APPROVAL OR DISAPPROVAL.—Not later than 60 days after the date on which the Secretary receives a submission under subparagraph (A), the Secretary shall notify in writing the parties to the workers' compensation settlement agreement of the determination of approval or disapproval. If the determination disapproves such submission the Secretary shall include with such notification the specific reasons for the disapproval. A determination that disapproves a submission is not valid if the determination does not include a specific explanation of each deficiency of the submission.

''(4) APPEALS.—

''(A) IN GENERAL.—A party to a workers' compensation settlement agreement that is dissatisfied with a determination under paragraph (3)(B), upon filing a request for reconsideration with the Secretary not later than 60 days after

the date of notice of such determination, shall be entitled to—

''(i) reconsideration of the determination by the Secretary (with respect to such determination);

''(ii) a hearing before an administrative judge thereon after such reconsideration; and

''(iii) judicial review of the Secretary's final determination after such hearing.

''(B) DEADLINES FOR DECISIONS.—

''(i) RECONSIDERATIONS.—

''(I) IN GENERAL.—The Secretary shall conduct and conclude a reconsideration of a determination under subparagraph (A)(i) and mail the notice of the decision of such reconsideration to the party involved by not later than the last day of the 30-day period beginning on the date that a request for such reconsideration has been timely filed.

''(II) APPEALS OF RECONSIDERATIONS.—If a party to the workers' compensation settlement involved is

dissatisfied with the Secretary's decision under subclause (I) that party may file an appeal within the 30-day period after the date of receipt of the notice of the decision under such subclause and request a hearing before an administrative law judge.

"(III) FAILURE BY SECRETARY TO PROVIDE NOTICE.—In the case of a failure by the Secretary to mail the notice of the decision under subclause (I) by the last day of the period described in such subclause, the Secretary shall be deemed to have approved the submission as submitted under paragraph (3)(A).

"(ii) HEARINGS.—

"(I) IN GENERAL.—An administrative law judge shall conduct and conclude a hearing on a decision of the Secretary under clause (i) and render a decision on such hearing by not later than the last day of the 90-day period beginning on the date that

a request for such hearing has been timely filed.

''(II) JUDICIAL REVIEW.—A decision under subclause (I) by an administrative law judge constitutes a final agency action and is subject to judicial review.

''(III) FAILURE BY ADMINISTRATIVE LAW JUDGE TO RENDER TIMELY DECISION.—In the case of a failure by an administrative law judge to render a decision under subclause (I) by the last day of the period described in such subclause, the party requesting the hearing may seek judicial review of the decision under clause (i), notwithstanding any requirements for a hearing for purposes of the party's right to such judicial review.

''(5) ADMINISTRATION OF MEDICARE SET-ASIDE PROVISIONS; PROTECTION FROM CERTAIN LIABILITY.—

''(A) OPTIONAL DIRECT PAYMENT OF MEDICARE SET-ASIDE AMOUNT.—

''(i) ELECTION FOR DIRECT PAYMENT OF MEDICARE SET-ASIDE.—With respect to a claim for which a workers' compensation settlement agreement is established, a claimant or workers' compensation payer who is party to the agreement may elect, but is not required, to transfer to the Secretary a direct payment of the qualified Medicare set-aside. With respect to a qualified Medicare set-aside paid directly to the Secretary, the parties involved may calculate the Medicare set-aside amount of such set-aside using any of the following methods:

''(I) In the case of any Medicare set-aside of a compromise settlement agreement under paragraph (2)(C)(ii), the amount calculated in accordance with such paragraph.

''(II) In the case of any Medicare set-aside, the amount based upon the payment amount for items and services under the workers' compensation fee schedule (effective as of the date of the agreement) applicable to the

workers' compensation law or plan involved, in accordance with paragraph (2)(C)(i)(I).

"(III) In the case of any Medicare set-aside, the payment amount applicable to the items and services under this title as in effect on the effective date of the agreement.

Such transfer shall be in accordance with a procedure established by the Secretary and shall be made only upon written consent of the other party to the agreement.

"(ii) ELECTION SATISFYING LIABILITY.—An election made under clause (i), with respect to a qualified Medicare set-aside shall satisfy any payment, in relation to the underlying claim of the related workers' compensation settlement agreement, required under subsection (b)(2) to be made by the claimant or payer to the Secretary. The Secretary shall have no further recourse, directly or indirectly, under this title with respect to such agreement.

"(B) PROTECTION FROM CERTAIN LIABILITY.—

''(i) LIABILITY FOR MEDICARE SET-ASIDE PAYMENT GREATER THAN PAYMENT UNDER WORKERS' COMPENSATION LAW.—No workers' compensation claimant, workers' compensation payer, employer, administrator of the Medicare set-aside, legal representative of the claimant, payer, employer, or administrator, or any other party related to the claimant, payer, employer, or administrator shall be liable for any payment amount established under a Medicare set-aside for an item or service provided to the claimant that is greater than the payment amount for the item or service established under the workers' compensation fee schedule (or in the absence of such schedule, the medical reimbursement rate) under the compensation law or plan of the jurisdiction where the agreement will be effective.

''(ii) LIABILITY FOR PROVIDER CHARGES GREATER THAN PAYMENT UNDER WORKERS' COMPENSATION AGREEMENT.—With respect to a workers' compensation settlement agreement, a provider

may not bill (or collect any amount from) the workers' compensation claimant, workers' compensation payer, employer, administrator of the Medicare set-aside, legal representative of the claimant, payer, employer, or administrator, or any other party related to the claimant, payer, employer, or administrator an amount for items and services provided to the claimant that is greater than the payment rate for such items and services established under the Medicare set-aside of the agreement. No person is liable for payment of any amounts billed for an item or service in violation of the previous sentence. If a provider willfully bills (or collects an amount) for such an item or service in violation of such sentence, the Secretary may apply sanctions against the provider in accordance with section 1842(j)(2) in the same manner as such section applies with respect to a physician. Paragraph (4) of section 1842(j) shall apply under this clause in the same manner as such paragraph applies under such section.

"(6) TREATMENT OF STATE WORKERS' COMPENSATION LAW.—For purposes of this subsection and subsection (p), if a workers' compensation settlement agreement is accepted, reviewed, approved, or otherwise finalized in accordance with the workers' compensation law of the jurisdiction in which such agreement will be effective, such acceptance, review, approval, or other finalization shall be deemed conclusive as to any and all matters within the jurisdiction of the workers' compensation law, including the determination of reasonableness of the settlement value; any allocations of settlement funds; the projection of future indemnity or medical benefits that may be payable under the State workers' compensation law; and, in the case of a compromise agreement, the total amount that could have been payable for a claim which is the subject of such agreement in accordance with paragraph (2)(C)(ii). A determination made by applicable authority for a jurisdiction that a workers' compensation settlement agreement is in accordance with the workers' compensation law of the jurisdiction shall not be subject to review by the Secretary.".

(c) CONFORMING AMENDMENTS.—Subsection (b) of such section is further amended—

(1) in paragraph (2)(B)(ii), by striking ''A primary plan'' and inserting ''Subject to subsections (p) and (q), a primary plan'';

(2) in paragraph (2)(B)(iii)—

(A) in the first sentence, by striking ''In order to recover payment'' and inserting ''Subject to subsection (q), in order to recover payment''; and

(B) in the third sentence, by striking ''In addition'' and inserting ''Subject to subsection (q), in addition''; and

(3) in paragraph (3)(A), by striking ''There is established a private cause of action'' and inserting ''Subject to subsection (q), there is established a private cause of action''.

(d) MODERNIZING TERMINOLOGY FOR PURPOSES OF MEDICARE SECONDARY PAYER PROVISIONS.—Subsection (b)(2)(A) of such section is amended by striking ''workmen's compensation law or plan'' and inserting ''workers' compensation law or plan'' each place it appears.

**SEC. 3. LIMITATION ON LIABILITY.**

The parties to a workers' compensation settlement agreement which met the provisions of section 1862(b) of the Social Security Act (42 U.S.C. 1395y(b)) on the effective date of settlement shall be accepted as meeting the

requirements of such section notwithstanding changes in law, regulations, or administrative interpretation of such provisions after the effective date of such settlement. Nothing in section 1862(b) of the Social Security Act (42 U.S.C. 1395y(b)) shall authorize the Secretary of Health and Human Services to impose liability that is additional to the liability in effect on the date of the enactment of this Act with respect to a workers' compensation settlement agreement the effective date of which is before such date of enactment, except in the case of fraud.

**SEC. 4. EFFECTIVE DATE.**

The amendments made by this Act shall apply to a workers' compensation settlement agreement with an effective date on or after the date of the enactment of this Act.

○